The Indiana Prosecutor

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RECENT DECISIONS

OUT OF STATE SUBPOENA SUFFICIENT BAC RESULTS IN

Forbes v. State,
___N.E.2d____
(On Transfer)
(Sup. Ct. 6/22/04)

The vehicle Darrell Forbes was driving was involved in a single car crash which resulted in the death of his passenger, Michael Smith. The crash took place in Orange County, Indiana. Forbes, who was seriously hurt in the crash, was transported to the University of Louisville Hospital in Kentucky. Two subpoenas requesting blood alcohol content test results were issued. Neither of those subpoenas conformed fully with the Uniform Act to Secure the Attendance of Witnesses Without the State, I.C. 35-37-5-1. The trial court denied the defendant's motion to suppress the test results. The Court of Appeals reversed the trial court, holding that the results had to be suppressed because they were not secured through procedures specified in the Uniform Act. The Supreme Court granted transfer and on June 22 issued its opinion in this case.

The issue, as seen by the Supreme Court, was whether the Uniform Act to Secure the Attendance of Witnesses Without the State is the exclusive procedure by which to obtain a witness or document from another jurisdiction. The Supreme Court held that it was not.

The Supreme Court found that nothing prohibits a witness from voluntarily responding to a request to cross the state line to testify, or the witness may require a subpoena, the Court said, as the hospital did in this case. If a subpoena is requested, that imposes the protections and conditions afforded by Kentucky law under its version of the Uniform Act. Parties to the Indiana proceeding for which the documents or witnesses have been secured, however, have no basis to complain if the witness chooses to waive this requirement and testify or supply documents voluntarily.

In that the Louisville hospital in this case responded to the subpoenas initiated prior to the Supreme Court's opinion in *Oman v. State*, the Supreme Court held that the requirements of *Oman* did not apply in Forbes' case. In 2000, the Supreme Court in *Oman* provided a framework for use by Indiana prosecutors seeking production of

private records. *Oman* requires that when a prosecutor is acting without a grand jury he must seek leave of court before issuing a subpoena *duces tecum* for the production of documentary evidence maintained by a third party.

Although the Supreme Court agreed with the defense that the first subpoena issued in the Forbes case was overbroad, that issue was not raised at the time of issuance. The issue was, therefore, waived. The Court found the second Forbes' subpoena to be of sufficient particularity to pass muster.

The trial court's denial of the defendant's Motion to Suppress was affirmed. The case was remanded for further proceedings.

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CRAWFORD v. WASHINGTON DOES NOT BAR EXCITED UTTERANCES

Hammon v. State
_____ N.E. 2d _____
(Ind. Ct. App. 6/14/04)

Fowler v. State
_____N.E.2d_____
(Ind. Ct. App 6/14/04)

Two opinions authored by Indiana Court of Appeals Judge Michael Barnes, both published on June 14, addressed the effect of *Crawford v. Washington* on the admissibility of excited utterances. On March 8, 2004, the United States Supreme Court held in *Crawford* that when pre-trial hearsay statements of a later unavailable witness are "testimonial", the 6th Amendment requires that the accused have had an opportunity to cross-examine the witness prior to the statements admission at trial. The Supreme Court did not provide much guidance as to what constitutes a "testimonial statement", however.

Three months after *Crawford*, the Indiana Court of Appeals published the first Indiana opinion discussing the impact of *Crawford* on the admissibility of an excited utterance when the declarant does not testify. In both of the cases handed down on June 14, the Court of Appeals held that *Crawford* did not preclude the admissibility of an excited utterance made by a person who did not appear as a witness at trial.

Both Aaron Fowler and Hershel Hammon were convicted of domestic battery. In both cases the issue was the admissibility of the responding officer's account of statements made to them by the respective victims. In neither case did the victim testify at trial regarding the battery upon her. In each instance the Court of Appeals found that the statement of the victim to the officer was an excited utterance. This did not, however, end the analysis in light of *Crawford v. Washington,* the Court said.

What is a "testimonial" pre-trial statement? Although the U.S. Supreme Court did not provide a clear definition of "testimonial" in *Crawford v. Washington,* the Court did provide some guidance on the subject. The Supreme Court said first that a statement does not have to be under oath to be testimonial. And, the Supreme Court did provide some examples of statements the Court would deem "testimonial". The court said that testimonial statements would include any extra-judicial statement contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions...circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial. A statement made during police "interrogation" would also qualify as a testimonial statement, the Supreme Court said.

The Court of Appeals noted that the Supreme Court did not say that all responses to police questioning would be testimonial. The Court of Appeals held, therefore, that when police arrive at the scene of an incident in response to a request for assistance and begin immediately the process of informally questioning those nearby in order to determine what happened, such statements are not testimonial. The Court of Appeals concluded that it would be difficult to perceive how an excited utterance could ever be testimonial in that such a statement, by definition, has not been made in contemplation of its use in a future trial.

The statements of the victims in both the Hammon and Fowler cases were held not to be testimonial. The statements of the victims as testified to by the responding officers were properly admitted.

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AUTO EXCEPTION NOT ADDRESSED IN *BLACK* OPINION

Black v. State
____N.E.2d____
(Ind. Ct. App)

The Court of Appeals 2003 opinion, *Black v. State*, held that if a vehicle is readily mobile when it is first seized, immobilization caused by police impoundment of the vehicle and the arrest of the driver did not make the automobile exception inapplicable. In so holding the Court of Appeals acknowledged that *Black* was irreconcilable with earlier Indiana cases that had held that the Fourth Amendment requires that police get a search warrant if a vehicle has been immobilized prior to the actual search of that vehicle and that the State is required to prove exigent circumstances existed at the time of the search.. The Court of Appeals held that the search of Black's car did not violate the Fourth Amendment.

The Supreme Court granted transfer and on June 24, issued its opinion in *Black v. State*. Although the Supreme Court noted the discussion in the Court of Appeals decision regarding the availability of the automobile exception, the Supreme Court held that a recent U.S. Supreme Court opinion controlled the outcome of *Black.* The Court concluded, therefore, that they need not address the auto exception issue. The case relied upon was *Thornton v. United States* decided on May 24, 2004. *Thornton* dealt with the applicability of the search incident to arrest exception to the search warrant requirement.

In deciding *Thornton*, the U.S. Supreme Court relied in part on *New York v. Belton*, a case decided by that Court in 1981, In *Belton* the Court held that once a police officer has made a lawful custodial arrest of an occupant of an automobile, the Fourth Amendment allows the officer to search the passenger compartment of that vehicle as a contemporaneous act incident of arrest. In *Thornton*, the Supreme Court concluded that *Belton* governed even when a police officer did not have contact until the person arrested had left the vehicle subsequently searched. The Supreme Court in *Thornton* held that the rule of *Belton* was not limited to situations where the officer makes contact with the occupant while the occupant is inside the vehicle, but that it applies as well if the officer first makes contact with the arrestee after the latter has stepped out of his vehicle.

The Indiana Supreme Court, in *Black*, held that the officers in that case had probable cause to arrest the defendant lawfully because he was operating a motor vehicle while his license was suspended. The subsequent search of the defendant's vehicle was a contemporaneous act incident to his arrest and clearly permissible under *Thornton.* The evidence located in Black's vehicle was properly admitted into evidence. [Ed. Note: This opinion does not address the "reasonableness" of the search under Indiana Constitutional analysis.]

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THIS TRASH SEARCH WAS CONSTITUTIONAL

Litchfield v. State
_____N.E.2d____
(Ind. Ct. App 5/19/04)

Law enforcement officers in Marshall County received information that the defendants (husband and wife) were receiving shipments from a gardening supply store that advertised in a "marijuana growers" magazine. In response to this information, the police twice searched the defendants' trash. On one of the two occasions that the Litchfield's trash was searched, the officers found marijuana Based upon that find, law enforcement officers obtained a search warrant to search the defendants' home. Police executed the search warrant on July 24, 2002 and discovered fifty-one marijuana plants on the back deck of the Litchfields' residence. The defendants filed a motion to suppress the evidence obtained by the

police during the trash searches and the subsequent search of their residence. The trial court denied the defendants' motion and certified the denial for interlocutory appeal.

The Litchfields directed the Court of Appeals to *State v. Stamper*, 788 N.E.2d 862 (Ind. Ct. App 2003), decided by a different panel of that Court. In *Stamper*, the Court of Appeals determined that an unwarranted search of trash, which was not placed out for collection and which was reached by trespassing on Stamper's property, was unreasonable. The Court of Appeals concluded that the evidence recovered from Stamper's property should have been suppressed. The Stamper court held that "it is the entering onto private property that determines whether the search is reasonable, not how many feet the officer had to traverse to reach the garbage bag."

The Court in *Litchfield* declined to follow *Stamper* to the extent that it appeared to create a bright-line test for determining reasonableness. In the Litchfields' case, the trooper did trespass onto the defendants property to seize the trash bags. The difference was that he did so in a manner consistent with the Litchfields' regular trash collection service and at times that would not bring the police officer's activities to the attention of the neighbors. These facts, the Court determined, demonstrated that the area where the trash containers were located was not curtilage. Considering the totality of the circumstances, the Court of Appeals did not find the search of the Litchfield's trash unreasonable. Accordingly, the Court of Appeals held that the trial court did not err in denying the defendants' motion to suppress.